and "deem granted" the approval of those jurisdictions if the federal deadlines are not met. Then the NPRM proposes to place on any local jurisdiction that dares to act (and is able to do so within the federal deadlines) the burden of justifying its exercise of traditional police powers that have been undisturbed for decades.

Such sweeping preemption is the very antithesis of narrow tailoring. The mere possibility that, depending on the facts, the way a particular local government might apply its local land use authority "might conceivably take forms that would frustrate valid federal goals"[19] is no justification whatsoever for sweeping preemption of all local land use regulation of broadcast transmission facilities.

B. As the NPRM Itself Recognizes, The Proposed Rules Are Far More Draconian Than The Evidence Can Justify.

The NPRM specifically notes that "[t]here are now over 12,000 radio and 1,500 television station licenses outstanding, totals which suggest that generally compliance with state and federal laws relating to broadcast station construction and operation has been possible and that state regulation has not been an insuperable obstacle to the exercise of the Commission's [lawful authority under the Communications Act]." NPRM at ¶ 16 (emphasis added). The NPRM goes on to say that the evidence offered in support of the proposed rule in the NAB Petition is "anecdotal," and provides "no basis on which to determine the

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[19] State of California v. FCC, 905 F.2d at 1244.

extent to which [the broadcaster] difficulties [set forth in the NAB Petition] are representative of radio and television broadcast industry tower siting generally." Id. at ¶ 19 (emphasis added).

In fact, when the NAB Petition is examined, the evidence it provides is far more "anecdotal" than the NPRM suggests. Far from setting forth "evidence regarding difficulties encountered by several broadcasters in attempting to meet local ordinances in connection with tower siting and construction" (NPRM at ¶ 19), the NAB Petition sets forth a grand total of five examples of supposed "difficulties" faced by broadcasters. NAB Petition at 10-15. Even assuming arguendo that the NAB Petition accurately characterizes those examples, it is difficult to see how five examples out of what the NPRM notes are over 12,000 radio and 1500 television station facilities nationwide is evidence of any problem at all, much less a rational basis for the wholesale preemption of 30,000 local laws proposed in the NPRM.[20]

Indeed, in light of the incredibly sparse record presented by NAB, the only rational tentative conclusions that the Commission should have reached in the NPRM are that local land use regulations have not been an obstacle to the widespread

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[20] We note in this regard the strained efforts that NAB apparently had to make just to cobble together the five examples it presents. As NAB Petition's make clear, only two of the five examples have anything remotely to do with DTV at all (Sutro Tower, Inc. and Jefferson County, Colorado). Two of the remaining three concern FM radio tower siting disputes "in the 1980's," and the third involved another FM radio tower siting dispute in the early 1990s. See NAB Petition at 10-15.

availability of broadcast services (NPRM at ¶ 16), and that there is "no basis" on which to adopt the rules proposed (id. at ¶ 19). That the NPRM nevertheless proposed the sweeping rules it did is utterly irrational.

C. The NPRM Makes Plain That The Primary Difficulties Faced In Meeting The FCC's DTV Deadlines Have Nothing To Do With Local Land Use and Zoning Laws.

According to the NPRM (at ¶ 3), "66 percent of existing television broadcasters will require new and upgraded towers to support DTV service, involving an estimated 1000 television towers." The NPRM (at ¶ 4) further notes that there are many "logistical problems" in meeting the aggressive DTV rollout schedule established by the Commission: "scarcity of construction crews, weather delays, [and] supply shortages."

In fact, the NPRM understates the scope of these "logistical problems," at least as they are characterized in the NAB Petition. According to the NAB, "in the space of five years, it is expected that approximately 400-800 television broadcasters having facilities on tall and medium towers will need to construct or alter towers in order to accommodate [DTV]," with each tower alteration or new tower construction taking three to six months to complete. NAB Petition at 8. Yet NAB notes that there are only "between 12 and 20 tower crews which are qualified to do tall tower work." Id. NAB therefore believes that "[c]urrent construction resources will be stretched to their limits -- and perhaps beyond -- in complying with the Commission's DTV build-out schedule." Id. at 9.

In other words, according to the NAB, the primary "obstacle" to achieving the FCC's DTV schedule is not state and local land use and zoning regulations at all. Rather, the primary impediments to DTV apparently are the supply and capacity constraints of the tower construction marketplace.[21]

Thus, what the NAB Petition and the rules proposed in the NPRM really represent is an improper effort to shift onto local governments the burden of making up for time pressures created not by those local governments, but by the confluence of FCC-created deadlines and what NAB refers to as the "technical and resource limitations of DTV conversion." But the FCC cannot and should not foist onto local governments the burden of truncating their police power responsibilities to try to make up for private marketplace supply and capacity problems that the FCC apparently is unwilling or unable to address or accommodate itself.

D. The NPRM Is Hopelessly Overbroad in Terms of The Services and Facilities Covered by the Proposed Rule.

The only justification offered for the broad preemption proposed in the NPRM and the NAB Petition is the notion that local land use and zoning regulation supposedly may serve as "an obstacle to the rapid implementation of [DTV] service." NPRM at ¶ 1. See also id. at ¶¶ 2-5, 10-16; NAB Petition at 2-22. The NPRM appears to acknowledge as much when it states that "[i]t is

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[21] NAB effectively concedes as much when it says that if construction crews face "delays from other factors," such as "regulatory delays caused by local land use restrictions," the DTV timetable may be "difficult if not impossible to achieve." NAB Petition at 9.

less clear that preemption will be needed where broadcasters do not face exigencies such as DTV conversion deadlines." NPRM at ¶ 16.

In fact, it is not simply "less clear" that preemption is needed outside the context of DTV; it is clear that no preemption is needed at all. As noted above, broadcast licensing and service has co-existed with local land use and zoning law for over 60 years, and in that time period, we are not aware of a single occasion where the Commission has ever preempted local land use or zoning laws in the context of broadcast tower siting or construction. To the contrary, FCC rules specifically accommodate such laws. See 47 CFR § 73.3534(b). There is simply no basis whatsoever to adopt any preemption rule related to standard television and AM and FM radio broadcast transmission facilities.[22]

NLC and NATOA submit that there is only one plausible explanation for NAB's effort to piggy-back AM and FM radio and standard television broadcast transmission facilities into the sweeping, wholesale preemption it proposes: NAB is seeking to

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[22] To be sure, both the NPRM (at ¶ 3) and the NAB Petition (at 6) make passing reference to the possibility that some FM radio antennas may have to be relocated in conjunction with DTV conversion. Careful review of the NAB Petition, however, reveals that the FM radio antenna issue is pure speculation. NAB's own declarant concedes that "there is no way to confirm whether or not two separate antennas are located on the same tower based solely on the FCC's engineering databases," and thus NAB's murky estimates of the scope of the supposed FM radio antenna problem are at best speculative. NAB Petition, Claudy Decl. at ¶ 18. Such speculation hardly forms a reasoned basis for the wholesale, blanket preemption proposed in the NPRM.

avoid the internal political problems that might arise among its non-DTV broadcaster membership if they too are not beneficiaries of the blanket preemption proposed. But while a trade association's desire to avoid conflicts among its membership is understandable, such trade association appeasement problems provide no public policy justification whatsoever for any action by the Commission, much less in our system of federalism can such private conflicts justify the wholesale federal intrusion into traditional local police powers that NAB and the NPRM propose.

The rules proposed are also equally and inappropriately overbroad in terms of the "broadcast transmission facilities" proposed to be covered by the sweeping preemption. The handful of supposed examples of "difficulties" cited by NAB, as well as the discussion in the NAB Petition and the NPRM, focus on the application of land use and zoning laws to broadcast towers and antennas. Yet the proposed rule's definition of "broadcast transmission facilities" goes far beyond towers and antennas to broadly include "associated buildings" and "all equipment, cables and hardware used for the purpose of or in connection with federally authorized radio or television broadcast transmissions." NPRM at App. B, § (f)(i) (emphasis added).

Read literally, this broad definition would seem to extend to any buildings, vehicles and other equipment used by a broadcaster, since those would necessarily be used "in connection with" federally authorized radio or television broadcast transmissions. When coupled with the incredibly broad sweep of

the proposed preemption, this definition would appear to exempt any buildings housing broadcast studio facilities from all land use and zoning laws, and possibly exempt all vehicles containing mobile cameras from all state and local vehicle inspection, permitting and license laws.

While we assume that is not the intent of the proposed rules, this clear overbreadth illustrates the ill-considered, slipshod nature of the broad rules that NAB seeks and the NPRM reflexively then proposes. We also believe it casts doubt on NAB's sincerity in its petition, and should serve as a warning to the Commission to assess NAB's cries of wolf with considerable skepticism.

E. The Proposed Rules Represent A Shocking Subordination of Public Health and Safety To The Interests of Broadcasters.

As the NAB Petition recognizes (but the NPRM curiously does not mention), a substantial proportion of DTV transmission facilities will require the construction or modification of tall towers, with 40% of affected towers being above 1000 feet and 83% above 300 feet in height. NAB Petition at 7 & Claudy Decl. at ¶ 10. Indeed, DTV tower construction and modification will require "a crash program across the country to build hundreds of new television towers, at heights up to 2,049 feet, taller than the world's tallest buildings."[23]

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[23] Id. at 7 (quoting "Crews are Scarce for TV's High-Danger Task," New York Times, May 4, 1997, at 1).

Moreover, as NAB also recognizes, there is a nationwide shortage of "trained construction crews" to carry out this "crash program" of tall tower upgrade and construction. NAB Petition at 7. "[U]nder any view, there are very few specially trained tower crews available to construct the towers needed to convert to DTV." Id. at 8.

These undisputed facts point to but one conclusion: There are serious public safety concerns posed by a "crash program" to construct tall towers with an admitted shortage of experienced crews. As one of the exhibits to NAB's Petition acknowledges, "[t]owers do in fact fall on occasion. Seven of them collapsed during a storm in Minnesota and North Dakota last month [April]."[24] In October 1996, a 1550-foot tower in Dallas collapsed, killing three persons. Id. And just last week, three workmen were killed when a 1999-foot tower collapsed in Jackson, Mississippi.[25]

In the face of these facts, the NPRM's proposal to impose tight nationwide deadlines on all local land use, zoning and building permit approvals, to deem such local approvals granted if not acted on within those tight deadlines, and to place on local governments the burden of justifying health and safety regulations is nothing short of a public safety disaster waiting

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[24] NAB Petition at Exh. C, New York Times, May 4, 1997.

[25] Communications Daily, October 24, 1997, at 11-12. It is a sad but true fact that the record now contains more fatalities from tower collapses (six) than there are examples of "difficulties" faced by broadcasters in obtaining local land use and zoning approvals (five), see NAB Petition at 10-15.

to happen. A "crash program" of massive construction where an admitted scarcity of qualified crews exists should call for more, not less, vigilant application of building code and other public safety requirements.

And many of the local requirements that would be preempted by the proposed rule are directly related to public safety. The local building code and permitting process, of course, is the only regulatory mechanism that exists to inspect and ensure the structural integrity of buildings and towers. Yet the proposed rule sweeps in "[a]ny state or local . . . building or similar law, rule or regulation." Similarly, land use and zoning laws frequently impose set-back requirements on large structures such as towers to minimize the danger exposure to persons on surrounding property. Yet the NPRM also proposes to sweep in "[a]ny state or local land use . . . law, rule or regulation."

Indeed, under the proposed rule, if a local government fails to act on a land use or building permit request for a broadcast tower with the specified deadlines, all such local approvals are "deemed granted." This means that after passage of the FCC-imposed deadline, a broadcaster would have a federally conferred right to construct a broadcast tower in complete disregard of all local building construction codes and all local setback requirements. And even if the local government is somehow able to rush to judgment and meet the tight FCC deadlines, if the broadcaster is unhappy with the local government's decision, it can petition the FCC and impose on the local government the

burden of defending any public safety requirement the local government imposes.

NLC and NATOA submit that the proposed rules reflect a shockingly cavalier disregard for the safety of the public. Under circumstances of tight construction deadlines and shortages of qualified crews, any rational government body responsible for public safety would be devoting additional resources to monitoring safety compliance more vigorously. Instead, the NPRM incredibly proposes to hamstring the ability of state and local governments effectively to carry out their historic public safety functions.

While NLC and NATOA agree that DTV is an important new service, we respectfully submit that advancement of DTV is not more important than public safety. State and local governments are in a far better position than the Commission to ensure that broadcast towers are constructed and located in a manner that best protects the public from danger. But if, as the NPRM proposes, the Commission is inclined to tie the hands of state and local governments in their ability to fulfill that role, the Commission had better be prepared to assume the role of ensuring that all broadcast towers nationwide are constructed and located in a manner to ensure public safety. That is a role the Commission has never assumed before and, we submit, has no resources or expertise to assume now. For this reason alone, the proposed rules should be abandoned.

F. The Proposed Rules Improperly and Inconsistently Ignore Other Legitimate Local Interests Besides Health and Safety.

As the Commission has long recognized, local land use and zoning laws serve several important and legitimate governmental interests in addition to public health and safety. In Satellite Earth Stations, 59 RR2d (P&F) at 1083, for example, the Commission explicitly recognized that "under prevailing law, aesthetics are a permissible regulatory objective," and the Commission specifically tailored its rules accordingly.[26] More recently, in revising its rules for larger satellite dishes and adopting new rules for smaller dishes and over-the-air reception devices, the Commission once again recognized the legitimacy and importance of aesthetics and other non-public safety related governmental interests served by local land use and zoning laws.[27] The rules adopted by the Commission in those proceedings likewise reflect some effort to accommodate land use interests other than public safety, with the over-the-air reception rules explicitly recognizing historic districts, see 47 CFR

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[26] See also Satellite Earth Stations, 62 RR2d (P&F) 11, 14 (1987) (rejecting NAB contention that the First Amendment automatically outweighs "aesthetics or other zoning objectives" and noting that Supreme Court recognized "that in certain situations, local aesthetic values will outweigh First Amendment considerations").

[27] See Preemption of Local Zoning or Other Regulation of Satellite Earth Stations, 11 FCC Rcd 4750, 4754 (1996) (localities best situated to resolve local land use and related aesthetic concerns); Preemption of Local Zoning Regulation, 11 FCC Rcd 19276, 19292 (1996) (recognizing legitimacy of potential adverse effect of preemption on historic preservation, even considering the small size of the antennas at issue and the fact that they are usually attached to existing structures).

§ 1.4000(b)(2), and the rules for larger dishes explicitly recognizing aesthetic objectives, see 47 CFR § 25.104(a)(1).

If, as the FCC has recognized, over-the-air reception devices (which are typically small and attached to existing structures), and satellite dishes (which range from less than one meter in diameter to a few meters in diameter) trigger legitimate local government interests in aesthetics and other non-public safety concerns, than a fortiorari broadcast transmission towers (which can range in size from several hundred feet to a few thousand feet in height) legitimately trigger such concerns. Indeed, such mammoth structures do not merely trigger legitimate aesthetic and other land use concerns, they implicate those governmental interests in a fundamentally different, and greater, way than small dishes and over-the-air reception devices.

The NPRM (at ¶ 15) appears to recognize as much, but then inexplicably proposes rules that appear to recognize only "health and safety" objectives. The proposed rules are flatly inconsistent in this respect with prior Commission precedent and analogous rules. It would be the height of irrationality for the Commission to fail to recognize the legitimacy of aesthetics and other land use objectives in connection with massive broadcast towers when the Commission has already recognized (as it must) the legitimacy of such local objectives in the context of far smaller and less intrusive satellite dishes and off-air reception devices. The only rational conclusion is that legitimate local interests in aesthetics and other land use objectives are far

stronger, and thus merit greater deference, in the context of the construction and placement of what all concede are massive, multi-story broadcast towers.

G. The Proposed Rules Are Actually Counterproductive To the Commission's DTV Goals.

As if the legal and practical infirmities of the preemption rules proposed in the NPRM were not enough of a problem, the proposed rules are likely to have the perverse effect of undermining the goals they are intended to serve.

According to the NPRM, one of the objectives of the rapid DTV rollout schedule adopted by the Commission was "to offset possible disincentives that any individual broadcaster may have to begin [DTV] transmissions quickly" and to avoid "lethargic" broadcaster conversion to DTV. Id. at ¶¶ 10 & 13. But the tight, arbitrary national deadlines, together with the "deemed granted" proposals in the NPRM, will create perverse incentives among both broadcasters and local governments that would undermine the very goals that the NPRM seeks to achieve.

The tight deadlines imposed on local government action, together with the "deemed granted" effect of a local government's failure to act, destroys any incentive a broadcaster might otherwise have to seek to cooperate with a local government in expediting any necessary applications or permits in a manner that meets both the broadcaster's needs and the local government's health, safety, aesthetics and other land use interests. Rather, the proposed rules would encourage the broadcaster to refuse to cooperate with local officials at all. Indeed, the proposed

rules reward a broadcaster's recalcitrance and stonewalling because the broadcaster would know that unless the local government can act within the tight national deadline, the FCC will deem "granted" all local approvals, obviating any need at all for the broadcaster to provide any information to -- or even to have to deal at all with -- the local government.

Moreover, the proposed rules also may provide broadcasters with an affirmative incentive to delay seeking any required local approvals until the last minute. This is because in most cases, due to local public notice and hearing requirements, the broadcaster will know that it will be impossible for the local government to act within the prescribed FCC deadlines. In these circumstances, it might be in the broadcaster's interest to delay any local application until the last minute, knowing that the result is likely to be a "deemed granted" approval.

The proposed rules also would create perverse incentives for local governments. Rather than encouraging local governments to work with broadcasters in reaching a mutually acceptable resolution of local land use and building code applications, the tight deadline and "deemed granted" proposals encourage local governments to act quickly and deny a broadcaster's application. The reason is obvious: Under the proposed rules, the only way that a local government can preserve any ability to exercise its historical police power authority over health, safety, aesthetics and other land use interests is to deny any broadcaster's application within the applicable 21, 30 or 45-day national

deadlines. Only by denying the application can the local government avoid the "deemed granted" effect of failing to act before the deadlines lapse. While any such denial would of course be subject to challenge by the broadcaster before the FCC under the proposed rules, unlike the "deemed granted" option, the alternative of FCC -- and subsequent court -- litigation would at least still hold out the possibility of protecting local public interests.

It is therefore difficult to see how the proposed rules, which would encourage greater confrontation and litigation between broadcasters and local governments, could possibly serve the Commission's goal of promoting rapid deployment of DTV. Rather, the proposed rules would simply bog the FCC, local governments and broadcasters down in more litigation. The result would be the worst of all possible worlds: possible frustration of both the Commission's DTV objectives and, at the same time, the vital health, safety, aesthetics and other local interests served by local land use, zoning and building permit laws.

CONCLUSION

For the foregoing reasons, the Commission should abandon entirely the rules proposed in the NPRM.

Respectfully submitted,

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